Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RANDOLPH A. OLSON,
PETITIONER

V.

TEAMSTERS LOCAL NO. 70, BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICAN; UNITED PARCEL SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts erred in instructing the jury that plaintiff had to prove that the employer manager who purportedly made the decision to discharge him knew of his protected activity, where other circuits have held that a retaliation plaintiff's burden is only to show that the employer as an entity had knowledge of an employee's protected activity.

2. Whether, in resolving the issue of the Union's duty of fair representation, the lower courts erred in not allowing the jury to assess the credibility of the Union's explanation for its inconsistent statements as to whether or not it knew of prior leave of absence cases where the employee was not discharged.

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PETITION FOR WRIT OF CERTIORARI

Randolph A. Olson ("Olson" or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on November 17, 2004.

OPINIONS BELOW

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit filed November 17, 2004, is not officially published and is reprinted at App. pages 1a-3a, *infra*. The Order of the United States District Court for the Northern District of California Denying Plaintiff's Request To Indicate If It Will Entertain Or Grant Plaintiff's Rule 60(b) Motion For Relief From Judgment is not officially published and is reprinted at App. pages 4a-20a, *infra*. The Order of the United States Court of Appeals for the Ninth Circuit filed December 30, 2004, denying rehearing is unpublished and is reprinted at App. pages 21a-22a, *infra*.

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit filed January 31, 2002, reversing in part and affirming in part summary judgment, is not officially published and is reprinted at App. pages 24a-29a, *infra*. The Order of the United States Court of Appeals for the Ninth Circuit filed September 17, 2002, denying an interim appeal from the denial of a Rule 60 motion for lack of jurisdiction, is not officially published and is reprinted at App. page 23a, *infra*.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 17, 2004. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on December 1, 2004. On December 30, 2004, the Ninth Circuit denied the Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S.Sup.Ct. Rule 13.1 and 13.3.

STATUTE INVOLVED

Section 704 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-3) provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on the job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an

investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This case arises under the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-3) and the common-law duty of labor organizations to represent their members "without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Breininger v. Sheet Metal Workers (1989) 498 U.S. 67, 73, quoting Vaca v. Sipes (1967) 386 U.S. 171, 177. This duty is commonly known as the "duty of fair representation."

The district court had jurisdiction under sections 1331 and 1337 of Title 28 of the United States Code, under section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)) and under section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e5(f)(3)).

Plaintiff was discharged from his employment as a driver with United Parcel Service ("UPS") while on a leave of absence for a medical injury suffered in an automobile accident in late August 1995. Prior to and during his leave of absence, plaintiff supported and assisted certain African-American employees of UPS in bringing and pursuing race discrimination claims against UPS.

During the early part of 1998,[1] plaintiff sought to return to work and bid for certain driving positions that

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[1] All dates are 1998 unless otherwise stated.

had become available during his absence. His initial efforts to do so were rebuffed by delay in posting positions for bid as required by the labor agreement between UPS and Teamsters Local 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 70" or the "Union"). Eventually, plaintiff obtained a return-to-duty medical release stating that he would be returning to work on August 17. Plaintiff delivered the medical release to UPS on August 3. Plaintiff's return to work date was just short of three-years after his automobile accident.

By letter dated August 7, UPS informed plaintiff that we was terminated from employment for exceeding the leave of absence time limits in Article 8, section 1 of the collective bargaining agreement between UPS and Teamsters Local 70. This provision of the collective bargaining agreement provided: "Any employee who is unable to work because of sickness or injury shall be deemed to be on leave of absence. Such leave will not exceed two (2) years unless extended by written consent of the Union and the Employer. In the absence of such consent, a request for extension of such leave shall be subject to dispute procedure, but in no event shall such leave of absence exceed three (3) years, except with the written consent of the Union and the Employer." App. p. 6a, *infra*.

Although Article 8, section 1 of the collective bargaining agreement apparently requires written union-employer consent for leaves of absence over two years in length, the practice of UPS and Teamsters Local 70 was not to require such written consent.

The Union processed plaintiff's grievance through the UPS-Teamsters grievance procedure.

When plaintiff inquired whether the Union was aware of other cases where employees had been discharged for exceeding time limits under Article 8, section 1, the Union stated that it was unaware of any. Ultimately, plaintiff's grievance was rejected by a UPS-Teamsters joint panel and did not proceed to arbitration.

Plaintiff initiated the case in district court alleging that his discharge was in retaliation for his support and assistance to the race discrimination claims brought by UPS's African-American employees and that the Union had breached its duty of fair representation because its long-standing hostility towards him for his intra-union activities in opposition to the current leadership of Local 70.

The district court initially granted summary judgment to UPS and the Union. As to UPS, the district court concluded that plaintiff could not show that the person UPS asserted made the decision to fire plaintiff knew of plaintiff's activities in support of the African-American employees. As to Local 70, the district court found that the Union has supplied plaintiff with the information in its possession and that the Union was not aware of other similar cases under Article 8, section 1, relying on the declaration of the Union's business agent that: "In the normal course of my job I am not aware of who is or who is not on a leave of absence. There is no procedure by which this information comes to me except by word of mouth. Although Local 70 has files on grievance cases I was confident that there was no such case in my files or I would have remembered it." App. pp. 8a-9a, *infra*.

Plaintiff appealed. The Ninth Circuit reversed the summary judgment against UPS, concluding that

plaintiff has presented sufficient evidence to show a causal link between his discharge and his support for the race discrimination claims of UPS's African-American employees. The Ninth Circuit affirmed as to the Union, finding that plaintiff's evidence did not show that the Union improperly handed his grievance, even if the Union was personally hostile towards him. App. pp. 24a-29a, *infra*.

While the first appeal was pending, plaintiff filed a motion under Rule 60. This motion relied on a statement by the Union's business agent before another UPS-Teamsters joint panel six months after the summary judgment motion that the business agent was personally aware of a number of leave of absence cases that he had personally handled in which the Union had successfully obtained reinstatement for the employee. App. pp. 9a-10a, *infra*.

In response to the Rule 60 motion, the Union asserted that the Union maintained a distinction between work-related and non-work-related injuries, and that the other cases involved work-related injuries. The district court denied the Rule 60 motion on the grounds that this distinction was reasonable. App. p. 14a, *infra*.

Plaintiff appealed from the denial of the Rule 60 motion. However, because the summary judgment was partially reversed before the Rule 60 appeal was heard, this appeal was dismissed for lack of jurisdiction. App. p 23a, *infra*.

Following the first appeal, the case against UPS was tried to a jury. In instructing the jury on proof of retaliation, the district court, over plaintiff's objections, instructed that it was plaintiff's burden to prove that the

UPS manager who was identified as the decisionmaker knew of plaintiff's protected activity, as follows: "To establish a 'causal link' between the adverse employment action and the protected activity, Plaintiff must prove by direct or circumstantial evidence that the individual making the adverse employment decision had knowledge of or was aware of Plaintiff's protected activity." App. p. 34a, *infra*.

The jury returned a verdict in UPS's favor. Plaintiff filed a second appeal from the judgment following the jury verdict. This appeal included an appeal from the prior denial of the motion under Rule 60.

The Ninth Circuit affirmed. As to the instruction on knowledge of the decision maker, the Ninth Circuit held that the jury was properly instructed that "the decision maker must have knowledge of protected activity to find an employment act retaliatory." As to the Rule 60 appeal, the Ninth Circuit affirmed the district court's decision on the grounds the Union's new statements were consistent with and cumulative of the prior evidence presented.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION THAT A JURY SHOULD BE INSTRUCTED THAT PLAINTIFF HAD TO PROVE THAT THE UPS MANAGER WHO PURPORTEDLY MADE THE DECISION TO DISCHARGE HIM KNEW OF HIS PROTECTED ACTIVITY, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS THAT A RETALIATION PLAINTIFF'S BURDEN IS ONLY TO SHOW THAT THE EMPLOYER, AS AN ENTITY, HAD KNOWLEDGE OF AN EMPLOYEE'S PROTECTED ACTIVITY.

In approving a jury instruction requiring proof of a decision maker's knowledge of protected activity, rather than knowledge of the employer as a whole, the Ninth Circuit's decision conflicts with decisions in other Circuits and imposes a requirement that only frustrates the object of the law in protecting employees from retaliation.

In Gordon v. New York City Bd. of Ed. (2 Cir. 2000) 232 F.3d 111, 116-17, the Second Circuit concluded that it was reversible error to instruct the jury that a plaintiff had to prove knowledge of the decision maker, either as part of a prima facie case or in showing pretext. The jury instruction in Gordon, like the one here, placed the burden on the employee to show that the agents who made the employment decision knew of the employee's protected activity. Id. at 116. In addressing the knowledge requirement of a prima facie case of retaliation, the Second Circuit in Gordon held that corporate knowledge was sufficient: "Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary

than general corporate knowledge that the plaintiff has engaged in a protected activity." Id. at 116.

To the extent that the employer seeks to use lack of decision maker knowledge to rebut a claim of retaliation, Gordon held that evidence of lack of knowledge by the decision maker is rebuttal evidence that the jury can consider in reaching its ultimate conclusion on the evidence but can reject in light of other evidence in the case (id. at 117).

The Eighth Circuit in Broadus v. O.K. Industries, Inc. (8 Cir. 2001) 238 F.3d 990, 991-992, reached the same conclusion. The Eighth Circuit rejected the employer's argument that proof of decision maker knowledge was part of a plaintiff's *prima facie* case and rejected the employer's contention that it was entitled to a jury instruction on decision maker knowledge, holding on both points:

> Evidence that the supervisor who terminated Charles Broadus had specific knowledge of the protected activity is not an element of his prima facie case. Circumstantial evidence may be used to establish a causal connection between the protected activity and the subsequent adverse employment action. * * * [¶] Next, appellants assert that the district court erred in not accepting their proposed instruction that Charles Broadus was required to prove that the specific individual who actually terminated him knew about his alleged acts of opposition. Rather, the jury was instructed that the "defendant", not the specific individual in the personnel department who terminated him, knew of his opposition. Appellants are only entitled to have the jury instructed on their theory of the case if it is legally correct. [Citation omitted.] Appellants have not shown that their

theory of the case was legally correct because they have failed to cite any relevant circuit case law supporting their theory.

Imposing decision maker knowledge as a burden of proof on the employee does not advance any interest in protecting employees from retaliation. Such a requirement only frustrates enforcement of the law. Employees are not in the position to establish all the internal communications of their employer that might lead to knowledge by a particular decision maker. Employees do not always know who the ultimate decision maker might be (or even who the employer might claim it was). Even assuming that discovery might lead to such evidence, there is equally the likelihood that it would not, either because no document reflecting a communication exists, because the information was conveyed orally, because of concealment or because privileges may prevent full information as to what all managers knew. As Gordon recognized (*id.* 232 F.3d at 117), if a decision maker claims lack of knowledge, the jury can consider that claim as some evidence of lack of a causal link. But that asserted lack of knowledge of a particular alleged decision maker is no more than one bit of conflicting evidence on this ultimate issue of retaliation that cannot be singled out for special treatment by a jury instruction or other rule that makes a plaintiff's ability to prove particular decision maker knowledge the be-all and end-all of a retaliation claim.

II. IN RESOLVING THE ISSUE OF THE UNION'S DUTY OF FAIR REPRESENTATION, THE NINTH CIRCUIT ERRED IN NOT ALLOWING THE JURY TO ASSESS THE CREDIBILITY OF THE UNION'S EXPLANATION FOR ITS INCONSISTENT STATEMENTS AS TO WHETHER OR NOT IT KNEW OF PRIOR LEAVE OF ABSENCE CASES WHERE THE EMPLOYEE WAS NOT DISCHARGED.

A union's duty of fair representation requires the union to act "without hostility or discrimination towards any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Breininger v. Sheet Metal Workers, supra, 498 U.S. at 73, quoting Vaca v. Sipes, supra, 386 U.S. at 177. The union's good faith handling of plaintiff's grievance is an issue for a jury to resolve. Teamsters v. Terry (1990) 494 U.S. 558, 565, 570, 571.

In granting summary judgment for Local 70, the District Court concluded that no breach of duty could have occurred as to Local 70's investigation of plaintiff's grievance because Local 70 simply did not have any way of knowing of other cases involving leaves of absence, relying on the business agent's declaration that: "In the normal course of my job I am not aware of who is or who is not on a leave of absence. There is no procedure by which this information comes to me except by word of mouth. Although Local 70 has files on grievance cases I was confident that there was no such case in my files or I would have remembered it."

Notwithstanding this claimed ignorance, six months later the same business agent had no difficulty recalling three prior leave of absence cases he personally

had handled and noted that his predecessors had also had similar cases.

The two statements cannot be reconciled by the explanation that the agent was only referring to non-work-related cases in his initial declaration. The declaration submitted in summary judgment makes no such distinction in asserting ignorance of other leave of absence cases.

Credibility is a question for the jury. The honesty and good faith of the Union is necessarily brought into question when the Union makes any materially misleading or false statement in justifying its actions towards plaintiff. See Reeves v. Sanderson Plumbing Prods., Inc. (2000) 530 U.S. 133, 147 (party's dishonesty about a material fact can be considered as "affirmative evidence of guilt").

By accepting the Union's explanation that it was always distinguishing between work-related and non-work-related injuries, the lower courts have made an assessment of the Union witness's credibility that belongs to a jury. Whether or not such a distinction would be reasonable had it been advanced consistently, it is the Union's inconsistency in explaining its actions that is material to the assessment of its credibility here. That assessment was for the jury to make.

CONCLUSION

For the foregoing reasons, Petitioner submits that a Writ of Certiorari should issue.

Respectfully submitted,

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(Any footnotes trail end of each document)

NOT FOR PUBLICATION

No. 03-16195
D.C. No. CV-99-00970-CW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH A. OLSON,
Plaintiff-Appellant,

v.

TEAMSTERS LOCAL NO. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; UNITED PARCEL SERVICE,
Defendants-Appellees.

Filed November 17, 2004

MEMORANDUM fn*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted October 5, 2004
San Francisco, California

Before: RYMER, TALLMAN, and BEA, Circuit Judges.

Randolph Olson appeals the denial of his Fed. R. Civ. P. 60(b) motion and the jury verdict for the United Parcel Service (UPS) on his claim for retaliation. He asserts that there were errors in the jury instructions and on evidentiary rulings. We affirm.

We review de novo Olson's claim that the district court misstated the elements of his retaliation claim. See Ostad v. Oregon Health Sciences Univ., 327 F.3d 876, 883 (9th Cir. 2003). The district court properly instructed the jury that the decision maker must have knowledge of protected activity to find an employment act retaliatory. See, e.g., Raad v. Fairbanks North Star Borough Sch. Dist., 323 F.3d 1185, 1197-98 (9th Cir. 2003). The district court also properly instructed the jury that the "but for" element of retaliation was met if protected activity was "a motivating factor" for his termination. See Ninth Cir. Model Civ. Jury Inst. 123A and Comment.

We agree with Olson that the district court erred in charging the jury with the shifting burdens relevant to pretext in a prima facie showing of retaliation. See Sanghvi v. City of Claremont, 328 F.3d 532, 540-41 (9th Cir. 2003) ("The technical elements of the presumptions and shifting burdens have significant potential to confuse juries."). However, to preserve an argument for appeal, Fed. R. Civ. P. 51 (c) requires that a party make a timely objection on the record, "stating distinctly the matter objected to and the grounds of the objection." The Ninth Circuit enforces Rule 51 strictly and there is no "plain error" exception in civil cases. Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 713 (9th Cir. 2001). Objection to a charge must be sufficiently specific to bring into focus the precise nature of the

alleged error. Id. Olson did not object to the district court's final jury instructions. He challenged the pretext instruction proposed by UPS as confusing and misleading. However, he proposed an alternative instruction incorporating the burden-shifting analysis. At no point did he object to instructing the jury on pretext. Olson therefore waived this argument. See Sanghvi, 328 F.3d at 541 (holding that plaintiffs waived their challenge to pretext instruction by failing to object and requesting alternative pretext instruction).

The record supports the district court's denial of the Rule 60(b) motion on the ground that the alleged new statements were consistent with and cumulative of prior evidence presented. The district court properly found that the evidence would not have changed the jury verdict and did not support a finding of misrepresentation. See Jones v. Aero/Chem Corp., 921 F.2d 875, 878-79 (9th Cir. 1990).

Nor does Olson establish that the district court abused its discretion in its remaining jury instructions and evidentiary rulings.

AFFIRMED.

Footnotes

fn* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

No. C-99-0970 CW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

RANDOLPH A. OLSON,
Plaintiff,

v.

TEAMSTERS LOCAL 70, INTERNATIONAL BROTHERHOOD OF TEAMESTERS, CHAUFFEUR, WAREHOUSEMEN AND HELPERS OF AMERICAN; UNITED PARCEL SERVICE, INC.,
Defendants

Filed December 12, 2001

ORDER DENYING PLAINTIFF'S REQUEST TO INDICATE IF IT WILL ENTERTAIN OR GRANT PLAINTIFF'S RULE 60 (b) MOTION FOR RELIEF FROM JUDGMENT

Plaintiff Randolph A. Olson asks the Court to indicate if it will entertain or grant his motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on the grounds that newly discovered evidence and fraud require this Court to vacate its order granting Defendants' motion for summary judgment and to reconsider Plaintiff's claims. Defendants United Parcel Service, Inc. and Teamsters Local 70 oppose Plaintiff's request. Having considered all of the papers filed by the parties, the Court declines

to indicate that it will entertain or grant Plaintiff's motion.

BACKGROUND

On March 2, 1999, subsequent to his discharge by Defendant United Postal Services, Inc. (UPS) and his grievance of that discharge in which he was represented by Defendant Teamsters Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 70), Plaintiff filed a complaint in this court in which he alleged that Defendant UPS breached the collective bargaining agreement (CBA) and retaliated against him in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000 et seq. and California's Fair Employment and Housing Act (FEHA), Cal. Govt. Code §§ 12940 et seq. In addition, Plaintiff alleged that Defendant Local 70 breached the duty of fair representation.

In May, 2000, Defendants Local 70 and UPS moved for summary judgment on all claims. The Court granted Defendants' motion for summary judgment, concluding that Plaintiff had failed to establish a genuine issue of material fact regarding whether Defendant Local 70 had breached its duty of fair representation and had failed to submit evidence sufficient to support a prima facie case of retaliation under Title VII or FEHA against Defendant UPS. On July 26, 2000, final judgment was entered in favor of Defendants (July 26 Order). On August 23, 2000, Plaintiff filed a notice of appeal. Briefing was completed on April 6, 2001 and the matter is now pending before the Ninth Circuit.

On July 16, 2001, Plaintiff filed the instant motion requesting that the Court indicate whether it would entertain or grant a motion under Federal Rules of Civil Procedure 60(b)(2) and (3) for relief from judgment on the grounds of newly discovered evidence and fraud, misrepresentation and/or misconduct.

RELEVANT FACTS

Plaintiff worked for UPS from the early 1970's until August 7, 1998, when he was discharged. Plaintiff sustained a back injury in a non-work related automobile accident in August, 1995. As a result of the injury, Plaintiff was on a medical leave of absence from September 1, 1995 until his termination. Plaintiff's employment with UPS was governed by two CBAs: a National Master Agreement, which covers Teamster employees nationwide, and a Northern California Supplemental Agreement (Supplemental Agreement). The Supplemental Agreement provides,

Any employee who is unable to work because of sickness or injury shall be deemed to be on leave of absence. Such leave will not exceed two (2) years unless extended by written consent of the Union and the Employer. In the absence of such consent, a request for extension of such leave shall be subject to dispute procedure, but in no event shall such leave of absence exceed three (3) years, except with the written consent of the Union and the Employer.

Supplemental Agreement, Article 8, § 1.

Upon receipt of Plaintiff's discharge letter, Marty Frates, a Local 70 business agent, timely filed a

grievance protesting the discharge. July 26 Order at 9. According to Frates, Plaintiff then inquired "whether I knew of anybody else who had stayed beyond the prescribed period for leave of absence and had been discharged. I told him that I was not aware of anyone else but would ask around." Id. A pre-panel meeting concerning Plaintiff's discharge was held on August 24, 1998. Id. After this meeting, Frates wrote a letter to Plaintiff and left him a phone message asking him to advise Frates "of anyone you know of that has been treated (differently than you have in this grievance." Id. at 11. On August 26, Plaintiff notified Frates that he had discovered that "Dave Lemmon just had a case we might use as well as others." Id. On August 28, 1988, Frates wrote a letter to Plaintiff in which he stated, "I have checked it out. Dave Lemmon was off on an industrial injury, which is different from your case." Id. Frates then asked other business agents whether they were aware of any employees who had been terminated for exceeding the time permitted for a leave of absence under Article 8, Section Symbol 1. Plaintiff and Frates uncovered the name of one UPS employee, Art Fisher, who had been given an opportunity to return to work even though he exceeded the time permitted for his leave of absence under Article 8, Section Symbol 1. Id.

At Plaintiff's grievance hearing on September 3, 1998, Frates argued that Plaintiff was being discriminated against because UPS had treated him differently than other employees, specifically Art Fisher. Id. at 15. The Labor Management Committee upheld Plaintiff's discharge. Id. at 16.

Plaintiff then filed suit in this Court on March 2, 1999 alleging that Local 70 breached its duty of fair

representation and that UPS breached the CBA and violated Title VII and FEHA when it discharged him in retaliation for protected activity. In May, 2000, Defendants filed a motion for summary judgment.

In opposing Defendants' motion for summary judgment, Plaintiff argued that he had requested information from Frates regarding other cases similar to his and Frates had deliberately concealed information about similar cases. In particular, Plaintiff believed that every local union was given copies of letters demonstrating UPS' alleged practice of permitting employees to seek extensions of their leaves of absences before terminating them and that these letters would prove that UPS had discriminated against him. In granting Local 70's motion for summary judgment the Court found that Local 70 had supplied Plaintiff with the information it had in response to his request and had adequately investigated Plaintiff's grievance. July 26 Order at 23-25. Therefore, the Court concluded that Local 70 had not breached its duty of fair representation. In granting Local 70's motion for summary judgment the Court relied on Frates' statement that he was not aware of other cases similar to Plaintiff's case nor of UPS' letters to employees on leave.

Frates stated:

In the normal course of my job I am not aware of who is or who is not on a leave of absence. There is no procedure by which this information comes to me except by occasional word of mouth. Although Local 70 has files on grievance cases I was confident that there was no such case in my files or I would have

remembered it. The files we have in Local 70's office on UPS cases are voluminous but they are not indexed by subject matter.

Id. at 25 (quoting Frates Dec. Paragraph Symbol 12). In addition, the summary judgment briefing included Frates' deposition statements. When Frates was asked at his deposition whether he' recalled any other letters regarding employees who were fired for exceeding the time limits under Article 8, § 1 of the CBA governing Plaintiff's employment with UPS, Frates responded, "Under Article VIII, Section 1, I don't remember any." Katzenbach Dec., Ex. 2 at 197.

At issue in this motion is a statement that Frates made at a January, 2001 Teamsters-UPS joint panel hearing (2001 joint panel hearing). At that hearing, Frates represented discharged employee Craig Gonsalves, who had been off work for more than two years on a work-related injury and whom UPS subsequently terminated under Article 8, § 1 of the CBA. Frates argued that Gonsalves was being discriminated against because other employees on prolonged industrial injury absences had been reinstated upon recovery and that Local 70 and UPS had previously agreed that employees out on extended industrial injury absences would not be terminated under Article 8, § 1. Katzenbach Dec., Ex. 1 at 3 & 16-20. In support of his argument, Frates cited three previous cases where employees similarly situated to Gonsalves had been reinstated.

Specifically, Frates stated:

I've had cases that are similar to this. And my predecessors had cases. For example, we have a Ricky De La Campa, who now is a car-washer, who was a feeder driver for several years that went into the car wash. He was off for a long period of time. The latest case that I handled that came before this panel involved a Darren Lindston [sic]. Darren Lindston [sic] at one time was a part-time supervisor, went driving as a package driver . . . And then was hurt, off the job for a long period of time, went through years of therapy, got released, and was put back to work. . . I'm proud to say that we went through the grievance process. Mr. Lindston [sic] was returned to work.

Katzenbach Dec., Ex. 1 at 18-19.

DISCUSSION

I. Jurisdiction

in the Ninth Circuit "the filing of a notice of appeal divests the district court of jurisdiction to dispose of the [60(b)] motion after an appeal has been taken, without a remand from [the appellate court]." Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984)(quoting Long v. Bureau of Economic Analysis, 646 F.2d 1310, 1318 (9th Cir.), vacated on other grounds, 454 U.S. 934 (1981)). The proper procedure for seeking Rule 60(b) relief once a case is on appeal is to "ask the district court whether it wishes to entertain the motion, or to grant it, and then move [the appellate court], if appropriate, for remand of the case." Id. In the instant motion, Plaintiff has correctly requested that this Court indicate whether it would entertain or grant a Rule 60(b) motion.

II. Legal Standard

Federal Rule of Civil Procedure 60(b) provides that, "upon such terms as are just," a court may relieve a party from final judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; (6) any other reason justifying relief from operation of the judgment.

Fed. R. Civ. P. 60(b).

A motion brought under Rule 60(b) is similar to a motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure, except that it may be asserted after the ten-day time limit for motions brought under Rule 59. The same standard applies to motions made on the ground that new evidence has been discovered, regardless of whether the motion is brought pursuant to Rule 59, or pursuant to Rule 60(b)(2). Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990). To prevail on a Rule 60(b)(2) motion, a movant may need a stronger showing than that required under Rule 59, however, because it is a more belated attack on the judgment. Id.; see also Coastal Transfer Co. v. Toyota Motor Sales. U.S.A., 833 F.2d 208, 211-12 (9th Cir. 1987).

To prevail on a motion under Rule 60(b)(2), a plaintiff must show that the newly discovered evidence that forms the basis of the motion "(1) existed at the time of trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" Jones, 921 F.2d at 878 (quoting Coastal Transfer, 833 F.2d at 211).

To prevail on a motion under Rule 60(b)(3), a plaintiff must "(1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct," Jones, 921 F.2d at 878-879 (quoting Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir. 1982)), and "(2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." Id. at 879. "When the case involves the withholding of information called for by discovery, the party need not establish that the result in the case would be altered." Id. In addition,

Failure to disclose or produce materials requested in discovery can constitute "misconduct" within the purview of this subsection. See Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978). "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress . . . The term can cover even accidental omissions . . .

Jones, 921 F.2d at 879 (quoting Anderson v. Cryovac, 862 F.2d 910, 923 (1st Cir. 1988).

III. Newly Discovered Evidence

A. Local 70

The crux of Plaintiff's argument is that Frates' statements at the 2001 joint panel hearing directly contradict his statements in his declaration supporting Local 70's motion for summary judgment on Plaintiff's claim for breach of duty of fair representation, upon which this Court relied in granting summary judgment. Plaintiff concludes that had the court known of the previous cases and Frates' knowledge of them, it would not have granted Local 70's motion for summary judgment.

Local 70 responds that, before Plaintiff's grievance hearing, Frates explained to Plaintiff that only cases involving employees who had been out on non-work-related injuries, like Plaintiff, would be useful in his grievance hearing and that there were no cases of which he was aware that did not involve industrial injuries. Local 70 therefore contends that because Frates never denied the existence of cases that related to employees out on work-related injuries, there is no newly discovered evidence.

Regardless whether this evidence is newly discovered or could have been obtained through due diligence prior to the Court's summary judgment order, Plaintiff's request would be denied because he fails to show that the previous cases constitute evidence of such magnitude that production of it earlier would have been likely to change the disposition of the case.

Frates specified in both his deposition testimony and declaration in support of Local 70's motion for summary judgment that he understood there to be a difference between industrial and non-industrial injuries and that, prior to Plaintiff's case, Article 8, § 1 had been applied only to non-work-related injuries. Franklin Dec., Ex. E at 209-210; see also Frates Dec. Paragraph Symbol Paragraph Symbol 5 & 8. Frates did not state that he was unaware of any industrial injury cases, only that he was not aware prior to Plaintiff's hearing of any cases under Art. 8, § 1. July 26 Order at 24-25. Frates had considered a case suggested by Plaintiff that involved an extended absence due to a work-related injury and had decided not to present it to the panel. Id. Frates' distinction between industrial and non-industrial injury cases was reasonable given that Article 8, § 1 previously had been applied only to non-work-related injuries. Therefore, had the previous cases and Frates' knowledge of them been presented during summary judgment, the disposition of the case would not have been different.

Furthermore, Plaintiff's argument that Local 70 breached its duty of fair representation because Frates failed to defend his claim using Article 29, § 4, a contract provision that he successfully used in one of the previous cases, is without merit. Plaintiff was given a full medical release for work; therefore, he was not covered by Article 29, § 4. fn1 July 26 Order at 7.

B. UPS

Plaintiff argues that the information Local 70 failed to disclose demonstrates that three other similarly situated individuals were treated differently than

Plaintiff and this showing supports his retaliation claim against UPS.

UPS asserts that (1) it produced documents regarding the previous cases, (2) Plaintiff failed to act with due diligence to obtain additional information on these cases, namely whether Frates knew of these cases and why he did not tell Plaintiff about them, and lastly (3) that this evidence would not have affected the outcome of the retaliation claim against UPS.

Regardless of whether this evidence is newly discovered or could have been obtained through due diligence prior to the Court's summary judgment order, Plaintiff fails to show that the evidence was of such magnitude that production of it earlier would have likely changed the disposition of the case.

To establish a Prima facie case of retaliation, the plaintiff must show that: "(1) he has engaged in statutorily protected expression; (2) he has suffered an adverse employment action; and (3) there is a causal link between the protected expression and the adverse action." EEOC v. Crown Zellerbach, 720 F.2d 1008, 1012 (9th Cir. 1983) (footnote omitted). The plaintiff must establish his or her prima facie case before the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse action. McAlindin v. County of San Diego, 192 F.3d 1226, 1238 (9th Cir. 1999), amended by 201 F.3d 1211 (9th Cir.), cert. denied, 120 S. Ct. 2689 (2000). If the defendant provides such a reason, the plaintiff must come forward with evidence that the defendant's stated reason is pretext for discrimination. Id.

Plaintiff relies on Chuang v. University of California Davis, Bd. of Trustees, 225 F.3d 1115, 1123 (9th Cir. 2000) to argue that the newly discovered evidence showing that UPS treated him disparately supports a finding of retaliation. Plaintiff also cites DeCintio v. Westchester County Medical Center, 821 F.2d 111, 115 (2d Cir. 1987) to support his contention that a showing of disparate treatment in retaliation cases can establish the causal connection between the protected expression and the adverse action. Id.

Plaintiff's argument is unavailing. In the Ninth Circuit, a prima facie case of retaliation is established if the employee shows that he was discharged "following protected activities of which the employer was aware." Aguirre v. Chula Vista Sanitary Service, 542 F.2d 779, 781 (9th Cir. 1976) "Essential to a causal link is evidence that the employer was aware that the plaintiff has engaged in the protected activity." Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982). Plaintiff's reliance on Chuang 225 F.3d at 1123, a case of disparate treatment based on race and national origin, is misplaced because it does not address the element of causation essential to establish a retaliation claim.

In ruling on UPS' motion for summary judgment, the Court found Plaintiff's evidence of a prima facie case lacking and entered summary judgment for UPS. The Court concluded that Plaintiff's evidence was insufficient to create a genuine issue of material fact with respect to whether those responsible for his discharge had knowledge of his protected activities. July 26 Order at 33-34. Plaintiff's newly discovered evidence fails to show the missing causal link.

Therefore, Plaintiff's motion based on newly discovered evidence does not meet the requirements of Rule 60(b)(2).

IV. Fraud, Misrepresentation, or other Misconduct

Plaintiff argues that Frates' statement at the 2001 joint panel hearing constitutes clear and convincing evidence that Frates fraudulently concealed the previous cases from Plaintiff. Plaintiff focuses on prior deposition testimony where Frates stated, "See, I wouldn't even know or have an idea who is on a leave of absence." Katzenbach Dec., Ex. 2 at 194. This statement, however, was made in response to a question asking whether Local 70 had a mechanism for obtaining consent from UPS to avoid termination when an employee was on an extended leave. Franklin Dec., Ex. E at 193. Frates was not responding to an inquiry about past grievances he had handled. Furthermore, when asked if he was aware of or had handled any cases prior to Plaintiff's under Article 8, § 1, Frates responded, "Under Article VIII, Section 1, I can't remember any." Id. at 197. When asked whether he had handled any Article 8, § 1 cases after Plaintiff's, Frates responded that he had, but they were industrial injury cases. Id. at 197-198. He later clarified that before Plaintiff's grievance hearing, UPS had not terminated employees with industrial injuries under Article 8, § 1 but had recently started to do so. Id. at 209. This shift in UPS policy was the subject matter of the 2001 joint panel hearing, where Frates introduced the previous cases to argue that previously UPS had not applied Article 8, § 1 to employees with industrial injuries. Thus, Frates' testimony at the 2001 joint panel hearing is consistent with his prior deposition testimony and declarations.

Although the failure to disclose or produce materials requested in discovery can constitute "misconduct" under Rule 60(b)(3), Jones, 921 F.2d at 879, Plaintiff fails to prove by clear and convincing evidence that he in fact requested these documents in discovery. fn2 Plaintiff was aware of Frates' distinction between industrial and non-industrial injuries. Beeson Dec. ¶ 2. For instance, Frates notified Plaintiff that at the grievance proceeding he would not be presenting the case of Dave Lemmon, a case suggested by Plaintiff, because Lemmon was off work on an industrial injury, but he would present the case of Art Fisher, who had been out on a non-work related injury, discharged under Article 8, § 1, and subsequently reinstated. Frates Dec. ¶ 7. If Plaintiff was interested in Frates' knowledge of cases similar to Lemmon's, an industrial injury case, he could have specifically requested this information through discovery. At Frates' deposition, Plaintiff only asked him whether he was aware of other cases prior to Plaintiff's that were brought under Art. 8, § 1. Frates replied that he could not remember any such cases. Franklin Dec., Ex. E at 197-198. At his deposition, Frates also testified that prior to Plaintiff's case, UPS had not applied Art. 8, § 1 to absences due to on-the-job injuries, id. at 209-210, notifying Plaintiff that prior claims of employees with industrial injuries would not be claims under Article 8, § 1. Therefore, it appears that Plaintiff never specifically requested the information on jindustrial injury cases in discovery.

Regardless of whether Plaintiff can prove Local 70 withheld evidence, he must also prove a "substantial interference" with his ability to defend against Local 70's motion for summary judgment by showing "the material's likely worth" as evidence in support of his

opposition to summary judgment or "by elucidating its value as a tool for obtaining meaningful discovery." Jones, 921 F.2d at 679. As discussed above,. the record on Local 70's motion for summary judgment showed that Frates made a distinction between industrial and non-industrial injury cases. Therefore, lack of evidence of prior industrial injury cases or lack of evidence of Frates' knowledge of them did not cause a substantial interference with Plaintiff's ability to defend against Local 70's summary judgment motion. Moreover, nothing suggests that this evidence would have been valuable in obtaining additional discovery.

CONCLUSION

For the foregoing reasons, the Court declines to indicate that it will entertain or grant a Rule 60(b) motion (Docket # 93).

Dated: DEC 12 2001

CLAUDIA WILKEN
United States District Judge

Footnotes

fn1 Art. 29, § 4 states "Any employee who, through no fault of their own, is no longer able to perform their normal duties, and has seniority with the Company, shall have the option of employment in other classifications . . ." Katzenbach Reply Dec. ¶ 1.

fn2 Defendant UPS produced a list of grievance proceeding minutes to Plaintiff, prior to Frates' deposition and the summary judgment briefing, that

included reference to the previous cases. Franklin Dec., Ex. C at 15 & 26 & 74. Plaintiff did not ask Frates about these cases at his deposition, see Franklin Dec., Ex. E, or request additional documents relating to the cases. See id. at Ex. A, B & D.

No. 03-16195
D.C. No. CV-99-00970-CW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH A. OLSON,
Plaintiff-Appellant,

v.

TEAMSTERS LOCAL NO. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA;
et al.,
Defendants-Appellees.

Filed December 30, 2004

ORDER

Before: RYMER, TALLMAN, and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No. 02-15081
D.C. No. CV-99-00970-CW
Northern California
(Oakland)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH A. OLSON,
Plaintiff-Appellant,

v.

TEAMSTERS LOCAL NO. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; et al.,
Defendants-Appellees.

Filed September 17, 2002

Before: PREGERSON, ALARCON and WARDLAW, Circuit Judges

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. See Fed. R. Civ. P. 54(b); Chacon v. Babcock, 640 F.2d 221 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties or judgment is entered in compliance with rule). Consequently, this appeal is dismissed for lack of jurisdiction.

NOT FOR PUBLICATION

No. 00-16640
D.C. No. CV-99-00970-CW/MJ

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDOLPH A. OLSON,
Plaintiff-Appellant,

v.

TEAMSTERS LOCAL NO. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; UNITED PARCEL SERVICE,
Defendants-Appellees.

Filed January 31, 2002

MEMORANDUM fn*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted December 5, 2001 San Francisco, California

BEFORE: BRIGHT fn**, B. FLETCHER and FISHER, Circuit Judges.

Olson brought this suit against United Parcel Service ("UPS") alleging that his discharge was retaliation for activity protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. ("Title VII"). He also brought an action against UPS for breach of the collective bargaining agreement binding UPS and his union, Teamsters Local 70 ("the Union"). In order to proceed on his breach of contract claim, Olson needed first to establish that the Union breached its duty of fair representation. Slevira v. Western Sugar Co., 200 F.3d 1218, 1221 (9th Cir. 2000).

The district court granted summary judgment in favor of UPS and the Union. It found that Olson failed to meet his prima facie burden for a Title VII retaliation claim and also failed to raise an issue of material fact suggesting that the Union breached its duty of fair representation. We review both decisions de novo. Weiner v. San Diego County, 210 F.3d 1025, 1028 (9th Cir. 2000); Burkevich v. Air Line Pilots Ass'n, Int'l, 894 F.2d 346, 349 (9th Cir.1990).

A.

We reverse the district court's finding that Olson had not met his prima facie burden for his discriminatory retaliation claim against UPS. Under the burden shifting analysis applicable in discriminatory treatment cases, Olson had the initial burden to present "very little" evidence, Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994), that "(1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action." EEOC v. Dinuba Med. Clinic, 222 F.3d 580, 586 (9th

Cir. 2000) (internal quotation marks omitted); Cohen v. Fred Mayer, Inc, 686 F.2d 793, 796 (9th Cir. 1982).

The district court found that Olson had failed to meet his burden of production under the third prong, establishing a causal link between his support of discrimination complaints and his discharge. But Olson presented adequate evidence from which a jury could infer that his engagement in protected activity was the reason for his discharge, including (1) his reputation for advocating on behalf of the rights of workers in discrimination related matters, Hines v. Gomez, 108 F.3d 265, 268 (9th Cir. 1997); (2) the timing of the discharge close on the heels of his expressed intent to return to work from a period of leave during which he visibly supported a major Title VII suit against UPS, see Ray v. Henderson, 217 F.3d 1234, 1244 (9th Cir. 2000); and (3) the disparate treatment of another employee who had been out of work longer than he but who was not discharged. Miller v. Fairchild Indus., Inc., 885 F.2d 498, 506 (9th Cir. 1989).

Olson also presented sufficient evidence from which a jury could infer that the reasons offered by UPS for the discharge were pretext for discrimination. UPS stated that they discharged Olson because they were experiencing a shortage of drivers and did not think that Olson was returning to work. But the evidence is sufficient for a jury to conclude that UPS discharged Olson only when they thought that he was returning to work. This fact, combined with Olson's prima facie case, is sufficient to permit a jury to conclude that UPS unlawfully discriminated. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 1333, 148 (2000); Chuang v. University of California, 225 F.3d 1115 (9th

Cir. 2000). Therefore, we reverse the district court's award of summary judgment against Olson on his Title VII retaliation claim.

B.

We affirm the district court's award of summary judgment against Olson on the breach of the duty of fair representation claim. Olson alleges that (1) Frates breached his duty of fair representation in his handling of Olson's grievance; and (2) the union members of the panel breached their duty of fair representation by not issuing an impartial decision on the merits.

To pursue the claim that Frates breached his duty of fair representation, Olson needed to present sufficient facts from which a jury could conclude that Frates improperly processed Olson's grievance, e.g. by failing to "conduct some minimal investigation" into its merits. Tenorio v. Nat'l Labor Relations Bd., 680 F.2d 598, 601 (9th Cir.1982). If Olson could make such a showing, the Union's representation would be assumed to be an arbitrary ministerial act unless the union explains the decision. Peters v. Burlington N.R.R., 931 F.2d 534, 540-41 (9th Cir. 1990). Olson argues that we should skip the first step because "[i]t is a factual issue . . . whether the substantial evidence of Local 70's hostility towards plaintiff influenced its handling of his grievance." We disagree. Evidence of hostility does not remove the need to present sufficient evidence that the Union improperly handled Olson's grievance. Having failed to present such evidence, Olson's claim against Frates must fail.

Nor does Olson state sufficient facts from which a jury could conclude that the Union members of the grievance panel breached their duty of fair representation, even assuming that we were to hold that such individuals are subject to this duty. See Thomas v. United Parcel Service, Inc., 890 F.2d 909 (7th Cir. 1989) (allowing suit for breach of duty of fair representation by grievance panel members to go forward based on statistical evidence showing that the members were biased against dissident union members). Olson does not present any evidence that could raise an inference that the panel was biased against him and, absent such evidence, courts must defer to the judgment of grievance panel decisions, like other expressions of union judgment, "whether faulty or not." Peters, 931 F.2d at 540.

Olson bases his argument that the panel should be required to issue reasons for its decision on Peters. But the holding of Peters was that, absent explanation, the union's perfunctory handling of a grievance, e.g. by failing to investigate it, would be assumed to be "ministerial" rather than an "actual, rational attempt[ ] on the part of a union to properly interpret a collective bargaining agreement." Peters, 931 F.2d at 539-540. The same assumption cannot be made with regard to grievance panel decisions that, by their nature, are actual attempts to properly interpret the CBA. We see no legal basis for requiring that members of grievance panels provide reasons for their decisions.

CONCLUSION

We REVERSE the district court's grant of summary judgment against Olson on the Title VII retaliation

claim. We AFFIRM the district court's grant of summary judgment against Olson on the breach of the duty of fair representation claim against the Union and the breach of contract claim against UPS.

Each party to pay its own costs.

REVERSED IN PART, AFFIRMED IN PART, REMANDED FOR FURTHER PROCEEDINGS.

Footnotes

fn*This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as may be provided by Ninth Circuit Rule 36-3.

fn** The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Cullen Transcript; Vol. 5, May 13, 2003, p.911:6 through p.913:4

MR. KATZENBACH: YES, YOUR HONOR. ONE, I MAY HAVE SOME OTHER -- ONE OF THE ONES -- I NOTICED IN THE JURY INSTRUCTION YOU HAVE ON RETALIATION, YOU HAVE A PARAGRAPH THAT STATES THAT IT IS PLAINTIFF'S BURDEN TO PROVE THAT THE DECISION MAKERS KNEW IT WAS PROTECTED ACTIVITIES. AND WE WOULD OBJECT TO THAT ON COUPLE OF GROUNDS. FIRST, I DON'T BELIEVE THAT'S CONSISTENT WITH THE NINTH CIRCUIT MODEL INSTRUCTIONS. SECONDLY, WE BELIEVE THAT THAT -

THE COURT: BECAUSE IT'S NOT IN THEM OR BECAUSE IT'S INCONSISTENT WITH SOMETHING THAT IS IN THEM?

MR. KATZENBACH: INCONSISTENT WITH IT BECAUSE, YOUR HONOR, IS THAT -- IT'S OUR POSITION THAT INSTRUCTIONS LIKE THAT REQUIRES US TO ESSENTIALLY PROVE TWO THINGS. FIRST, IT REQUIRES ESSENTIALLY TO PROVE WHO THE DECISION MAKERS ARE. AND, SECONDLY, IT PUTS A BURDEN OF PROOF ON US I DON'T THINK IS APPROPRIATE.

IT SEEMS TO ME THAT THE BURDEN OF PROOF -- THAT THE QUESTION OF "DID THE DECISION MAKERS KNOW IT" IS NOT PART OF THE PRIMA FACIA CASE, RATHER IT IS AN ARGUMENT TO BE MADE BY THE DEFENDANTS AS PART OF THEIR CLOSING

ARGUMENT. TO BE ARGUING FOR THAT, THE EVIDENCE DOESN'T SUPPORT US BECAUSE WE HAVEN'T SHOWN THAT THE DECISION MAKERS WHO THEY SAY WERE THE DECISION MAKERS KNEW ABOUT MR. OLSON'S PROTECTED ACTIVITY.

I BELIEVE THAT THERE SHOULD BE -- THAT THAT IS SIMPLY AN ARGUMENT THAT CAN BE MADE. AND I DON'T BELIEVE IT IS APPROPRIATE TO SET -- MAKE THAT PART OF THE BURDEN OF PROOF ON EITHER PARTY.

THE COURT: WHICH NINTH CIRCUIT INSTRUCTION IS IT INCONSISTENT WITH?

MR. KATZENBACH: I BELIEVE IT'S INCONSISTENT WITH PRIMA FACIA CASE INSTRUCTION, WHICH TALKS ABOUT ONLY CAUSAL CONNECTION. I DON'T BELIEVE ANY NINTH CIRCUIT CASE STATES THAT PROVING WHO THE DECISION MAKERS WERE OR THAT THEY KNEW WAS -- IS NECESSARILY APPROPRIATE PART OF A PRIMA FACIA CASE FOR A PLAINTIFF. I THINK THE APPROPRIATE --

THE COURT: WE'RE TALKING ABOUT PRIMA FACIA CASES IN THE TRIAL CONTEXT. IT'S A BURDEN OF PROOF.

MR. KATZENBACH: MAYBE IF I --

THE COURT: WHAT YOU'RE SAYING IS IT'S NOT IN THERE. BUT I'M NOT HEARING WHERE IT'S

INCONSISTENT WITH SOMETHING THAT IS IN THERE OR INCONSISTENT WITH THE LAW.

MR. KATZENBACH: I BELIEVE IT'S INCONSISTENT WITH TIE LAW FOR WHAT I'VE JUST SAID. I THINK IT PUTS A BURDEN OF FROOF ON US THAT IS NOWHERE IN THE INSTRUCTION AND IN TILE NINTH CIRCUIT AND IT'S NOWHERE IN ANY CASE LAW THAT I'M AWARE OF IN THE NINTH CIRCUIT, WHICH SAYS THAT THAT IS PART OF PLAINTIFF'S BURDEN OF PROOF. I THINK THAT THE CORRECT APPROACH IS THAT THAT IS SIMPLY AN ELEMENT OF ARGUMENT TO BE MADE FOR THE JURY –

Cullen Transcript; Vol. 6, May 14, 2003, p.1014:15-19

THE COURT: ALL RIGHT. SO MEMBERS OF THE JURY, NOW THAT YOU'VE HEARD ALL THE EVIDENCE, IT'S MY DUTY TO INSTRUCT YOU ON THE LAW THAT APPLIES TO THIS CASE. A COPY OF THIS INSTRUCTION WILL BE AVAILABLE FOR EACH OF YOU IN THE JURY ROOM FOR YOU TO CONSULT IF YOU SHOULD FIND IT NECESSARY.

Cullen Transcript; Vol. 6, May 14, 2003, p.1019:17 through p. 1020:22

ON PLAINTIFF'S CLAIM OF RETALIATION FOR OPPOSING RACE DISCRIMINATION AT UNITED PARCEL SERVICE, AND PARTICIPATING IN AN

INVESTIGATION AND A LAWSUIT AGAINST UPS FOR RACE DISCRIMINATION, PLAINTIFF HAS THE BURDEN OF PROVING EACH OF THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE:

ONE, PLAINTIFF ENGAGED IN OR WLS ENGAGING IN AN ACTIVITY PROTECTED UNDER STATE AND FEDERAL LAW; THAT IS, OPPOSING UNLAWFUL EMPLOYMENT PRACTICES PROHIBITED BY STATE AND FEDERAL LAW OR PARTICIPATING IN AN INVESTIGATION, PROCEEDING, OR HEARING UNDER STATE AND FEDERAL LAW AGAINST RACE DISCRIMINATION IN EMPLOYMENT. THIS IS REFERRED TO AS PROTECTED ACTIVITY.

NUMBER TWO, DEFENDANT SUBJECTED PLAINTIFF TO AN ADVERSE EMPLOYMENT ACTION; THAT IS, TERMINATING HIS EMPLOYMENT; AND, NUMBER THREE, PLAINTIFF WOULD NOT HAVE BEEN SUBJECTED TO ADVERSE EMPLOYMENT ACTION BUT FOR PLAINTIFF HAVING ENGAGED IN THE PROTECTED ACTIVITY; THAT IS, ENGAGING IN SUCH PROTECTED ACTIVITY WAS A MOTIVATING FACTOR FOR PLAINTIFF'S TERMINATION.

IF PLAINTIFF HAS FAILED TO PROVE ANY OF THESE ELEMENTS, YOUR VERDICT SHOULD BE FOR DEFENDANT.

TO DETERMINE WHETHER PLAINTIFF WOULD NOT HAVE BEEN TERMINATED -- I'M SORRY. TO DETERMINE WHETHER PLAINTIFF WOULD NOT HAVE BEEN SUBJECTED TO ADVERSE EMPLOYMENT ACTION BUT FOR PLAINTIFF HAVING ENGAGED IN THE PROTECTED ACTIVITY, PLAINTIFF MUST ESTABLISH A CAUSAL LINK BETWEEN THE ADVERSE EMPLOYMENT ACTION AND THE PROTECTED ACTIVITY.

TO ESTABLISH A CAUSAL LINK BETWEEN THE ADVERSE EMPLOYMENT ACTION AND THE PROTECTED ACTIVITY, PLAINTIFF MUST PROVE BY DIRECT OR CIRCUMSTANTIAL EVIDENCE THAT THE INDIVIDUAL MAKING THE ADVERSE EMPLOYMENT DECISION HAD KNOWLEDGE OF OR WAS AWARE OF PLAINTIIFF'S PROTECTED ACTIVITY.